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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

RAY SOWARDS,

Petitioner,

v.

CITY OF MILPITAS *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the qualified immunity exception, of a reasonable officer acting in good faith, based upon his subjective interpretation of a perceived exception to a clearly established constitutional right, or upon acting within clearly established exceptions to well defined constitutional limitations of the officer's actions?

PARTIES TO THE PROCEEDING

Ray Sowards, the plaintiff in the trial court, and petitioner herein, is an attorney licenced to practice law in California, with a small practice in Milpitas, California.

The City of Milpitas is an incorporated city, located in the south easterly part of the San Francisco Bay area of California. Ron Gordon is a Sargent with the Milpitas Police Department.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on October 17, 2007 and is attached herein as Appendix A. The Order of the United States District Court was filed on July 5, 2005 and attached herein as Appendix B. The case was originally filed in California Superior Court but was removed by the defendants upon federal question jurisdiction, 28 U.S.C. §§ 1331, 1341. The case was decided upon summary judgment and a final judgment was entered. The opinion of the Ninth Circuit Court of Appeals was filed on October 17, 2007.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). A timely petition for rehearing *en banc* was filed and the order of the Ninth Circuit Court of Appeals denying the petition for rehearing was filed December 5, 2007. (Appendix C).

STATUTORY PROVISION INVOLVED

Petitioner sued under 42 U.S.C. § 1983 for damages for violation of his Fourth Amendment right against unreasonable search and seizure. The District Court granted summary judgment upon qualified immunity based upon the second part of the two part test established by *Saucier v. Katz*, 533 U.S. 194 (2001).

THE STATEMENT OF THE CASE

At the conclusion of a less than impartial six week investigation conducted by Sgt. Ron Gordon of the Milpitas, California, Police Department, attorney Ray Sowards was arrested for an alleged sexual assault upon a former client, Myhoa Starr, claimed to have occurred in Mr. Sowards' law office. After his arrest on August 16, 2001, Mr. Sowards was taken to the Milpitas Police station, where he gave a videotaped consensual interview following a *Miranda* warning. Attorney Hoa Glassey, an associate in Mr. Sowards's office and potential alibi witness, arrived at the police station following Mr. Sowards's request for counsel. Ms. Glassey, requested a confidential meeting with her client, Ray Sowards. Ms. Glassey was required to provide a witness statement prior to being allowed to conduct the meeting. Sgt. Gordon then took Ms. Glassey to the interview room where Mr. Sowards' was being held for the purpose of a consultation. Sgt. Gordon, however, voiced his opinion that Ms. Glassey could not act as Mr. Sowards' lawyer due to her status as a witness. Sgt. Gordon then left the interview room. Sgt. Gordon then clandestinely recorded the conversation between Mr. Sowards and his attorney

Mr. Sowards sued for violation of his civil rights under 42 U.S.C. § 1983, and although the trial court found a violation of Mr. Sowards's Fourth Amendment Right to privacy by an unreasonable search, the Court

nonetheless granted summary judgment on the basis of qualified immunity indicating that,

> "a reasonable officer in Gordon's position could have believed that his recording of the conversation between Sowards and Glassey in this rather unique factual context was lawful."

The Appellate Court found that when,

> ". . . viewed in light most favorable to Sowards, the facts may well support a violation of his Fourth Amendment Rights. Nevertheless, at step two, for a constitutional right to be clearly established 'its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'"

In the absence of case authority both binding and decisional, discussing an attorney's reasonable expectation of privacy in a police station, the Court found that "a reasonable officer in Sgt. Gordon's position could have believed that his actions were lawful." Petitioner argues that the application of qualified immunity to achieve a summary judgment in a case asserting violation of a clearly established constitutional right should not be based upon the subjective perception of an exception to the constitutional right. Even though there is no policy, no exigency, no security concern or other factor that arises from the setting of the interview, i.e. a police station interview room, the trial and appellate courts finding no case involving a police station interview room, hold in favor of the Sargent because they conclude that

the setting, or Sgt. Gordon's armature analysis of the potential conflict of attorney Glassey's acting as a witness and attorney, may create a good faith belief that Sgt. Gordon was justified in violating the Fourth Amendment right against unreasonable search.

Petitioner argues to the contrary that the expectation of privacy in what appears to be a private consultation with counsel is a clearly established right. The cases are clear that there are few bases for exception to this right. Warrantless searches can be conducted based upon exigency and consent, neither of which was present here. Petitioner argues that *Saucier* does not stand for the principal that there must be a prior case arising from each unique factual context in which a civil right is violated. Instead, the clarity of the right, combined with a lack of the existence of a clearly established exception, requires a reasonable police officer to observe the right. Qualified immunity should not attach to a police officer's own subjective version of exceptions to a clearly established right, such as the sanctity of a private consultation with ones lawyer.

REASONS FOR GRANTING THE PETITION

In *Hope v. Pelzer* 536 U.S. 730 (2002), this Court denied qualified immunity to officers handcuffing an inmate to a "hitching post", notwithstanding a unique factual setting. At page 739 of Justice Stevens' opinion he states,

> . . . qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.' *Saucier*

> *v. Katz*, 533 U.S. 194, at 206. For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell v. Forsyth* (1985) 472 U.S. 511, 535 footnote 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.' *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Fourth Amendment of the United States constitution protects ,

> "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . .".

This Court has stated,

> 'the most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption ... that the exigencies of the situation made that course imperative'" (*Coolidge v. New Hampshire* [1971] 403 U.S. 443, 454-455)

The Court goes on to eloquently state the value of Fourth Amendment Protection.

> ". . . the burden is on those seeking the exemption to show the need for it." "In times of unrest, whether cause by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times, not all together unlike our own they won — by legal and constitutional means in England, and by revolution on this continent — a right of personal security against arbitrary intrusions by official power. If times have changed, reducing every man's scope to do as he pleases in a an urban and industrial world, the changes have made the value served by the Fourth Amendment more, not less, important." (*ibid* page 455; see also *People v. Vaughns,* 182 Colo. 328, 513 P.2d 196, cited by *People v. Harfmann,* (1976) 38 Colo. App. 19, 55 P. 2nd 187

In analyzing this case, the trial court searched for precedent to find a case factually similar to the circumstances of this case. Not finding a case where an attorney and his client were secretly tape recorded in a police station, except for a state court case reported from the Colorado Court of Appeals [*People v. Harfmann* (1976) 38 Colo. App. 19, 555 P.2d 187], the Court concluded that a reasonable officer might have concluded that his actions were lawful. This analysis, however,

ignores the obvious. The District Court quoted *DeMassa v. Nunez* 77 Fed. 2nd 1505, 1506 (9th Cir. 1985), stating, "It is axiomatic that the attorney-client privilege confers upon the client an expectation of privacy in his or her confidential communications with the attorney." This is a plain and widely understood rule of privacy. It is enforced through the equally well understood Fourth Amendment prohibition against unreasonable search. All reasonable police officers understand these principles. Likewise, it is equally well established that there are extremely limited exceptions where warrantless searches may occur [*Coolidge v. New Hampshire* (Supra)]. In *Groh v. Ramirez*, 540 U.S. 551 (2004), this Court stated in the opinion denying qualified immunity delivered by Justice Stevens,

> No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional. (*Groh v. Ramirez*, at page 564)

The reasoning of the trial court should not be to find immunity in the absence of precedence prohibiting the subjective and novel analysis of the police officer defining his own new exception to a clearly established rule of constitutional law, but to deny immunity based upon the clearly established rule of law in the absence of previously defined "safe harbor" exception. Relegating civil rights claims to existing precedent addressing the specific exceptions from an established rule, is to deny the application of civil rights except in those novel situations where they have been previously violated.

This case demonstrates that, notwithstanding this Court's opinions in *Hope v. Pelzer* (Supra), and *Groh v. Ramirez* (Supra), trial courts and the Ninth Circuit Court of Appeals are still searching for a binding precedent addressing the specific exception applied by the police officer, instead of merely looking to application of a clearly established rule of constitutional law, and then testing the actions of a "reasonable officer" by looking to see if the officer's actions fall within established exceptions to the rule. The paradigm of the Ninth Circuit works to deprive litigants of meritorious cases asserted to address violations of their civil rights by unreasonable officers. Accordingly, this case illustrates an important issue of civil rights requiring the attention of this Court.

CONCLUSION

The reasonable police officer acting in good faith would recognize the right of a defendant against an unreasonable search and seizure. Any search of a defendant absent a warrant requires that it fall within the set of clearly defined exceptions. None applied in this circumstance. The right against unreasonable search is exemplified by the overwhelmingly recognized privacy rights of a client to have the effective assistance of counsel in private consultation. It is not the position of a reasonable officer to second guess that such right against unreasonable search may be abrogated in this or that special circumstance . It is the clearly defined rule of warrantless search for which there are clear exceptions trained into the education of police officers that form the basis of the actions of a reasonable officer. The failure of the District Court and the Ninth Circuit Court of

Appeals to recognize this simple reasoning demonstrates a misunderstanding of the application of the tests for qualified immunity set forth in *Saucier v. Katz* 533 U.S. 194 (2001). Accordingly this mistaken reasoning needs to be addressed and this petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 17, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-16530

D.C. No. CV-03-03036-JF

RAY SOWARDS,

Plaintiff - Appellant,

v.

CITY OF MILPITAS; et al.,

Defendants - Appellees.

Appeal from the United States District Court for the Northern District of California, Jeremy Fogel, District Judge, Presiding

Submitted August 17, 2007.*
Filed Oct. 17, 2007.

Before: O'SCANNLAIN, HAWKINS, and WARDLAW, Circuit Judges.

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* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Appendix A

MEMORANDUM**

Ray Sowards appeals from the district court's grant of summary judgment in favor of Sgt. Ron Gordon and the City of Milpitas, California in this 42 U.S.C. § 1983 action. After Sowards was arrested, the police placed him in an interrogation room, read him his *Miranda* rights, and interviewed him. The police recorded this interrogation on videotape. Thereafter, Sgt. Gordon allowed Hoa Glassey, an attorney and alibi witness, to enter the room and left Glassey and Sowards alone together, telling them that Glassey could not act as Sowards's lawyer because she was an alibi witness. Sowards alleges that the City and Sgt. Gordon violated his constitutional rights when Gordon videotaped Sowards and Glassey's ensuing conversation. The remaining facts and procedural history are repeated herein only as necessary.

The district court held that the City and Sgt. Gordon were entitled to qualified immunity, which Sowards now challenges. To determine whether a defendant is entitled to qualified immunity we apply the two-part test established by *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). First, we examine "whether the [officers] violated [the plaintiff's] constitutional rights on the facts alleged and, second, if there was a violation, whether the constitutional rights were clearly established." *Boyd v. Benton County*, 374

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

F.3d 773, 778 (9th Cir.2004) (quoting *Desyllas v. Bernstine*, 351 F.3d 934, 939 (9th Cir.2003)).

Viewed in the light most favorable to Sowards, the facts may well support a violation of his Fourth Amendment rights. Nevertheless, at step two, for a constitutional right to be clearly established, "its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 780-81 (citations and internal quotation marks omitted). The scope of protection the Fourth Amendment affords to a pre-trial arrestee's interrogation-room conversation with an attorney who is also an alibi witness has not been clearly established. *See Saucier*, 533 U.S. at 202, 121 S.Ct. 2151 ("The relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). Sowards has been unable to identify, and we have been unable to find, any binding or non-binding authority whatsoever that establishes that a police officer's recording of a conversation between a pretrial arrestee and an attorney-witness at a police station constitutes a Fourth Amendment violation.[1] *See Boyd*, 374 F.3d at 781 ("[W]e begin our

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1. The closest case on point is a 1976 decision of the Colorado Court of Appeals, in which the court held that police officers who observed an attorney deliver narcotics to his incarcerated client while they met in an interrogation room at the county jail violated the attorney's reasonable expectation of privacy. *People v. Harfmann*, 38 Colo.App. 19, 555 P.2d 187 (1976). Even to the extent this precedent is related, we cannot conclude that it would

(Cont'd)

inquiry by looking to binding precedent.... [I]n the absence of binding precedent, we look to whatever decisional law is available to ascertain whether the law is clearly established...." (citations and internal quotation marks omitted)). Accordingly, even viewing the facts in the light most favorable to Sowards, we agree with the district court's conclusion that a reasonable officer in Sgt. Gordon's position could have believed that his actions were lawful.

We also agree with the district court's conclusion that Sowards failed to allege a Fifth Amendment violation because his videotaped conversation with Glassey was not an interrogation. *See Illinois v. Perkins*, 496 U.S. 292, 298, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (holding that an incarcerated suspect who made incriminating statements to an undercover law enforcement officer posing as a fellow inmate was not subjected to a custodial interrogation) (citing *Hoffa v. United States*, 385 U.S. 293, 304, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966)); *Williams v. Nelson*, 457 F.2d 376, 377 (9th Cir.1972) (concluding that police recording of a defendant's conversation with his co-defendant while the two were alone in an interrogation room did "not constitute coercion").

The decision of the district court is

AFFIRMED.

(Cont'd)

have put a reasonable officer in Sgt. Gordon's position on notice that his conduct would be clearly unlawful. *See Boyd*, 374 F.3d at 778 (quoting *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151).

APPENDIX B — ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION FILED JULY 5, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
SAN JOSE DIVISION

Case Number C-03-3036-JF

[Doc. No. 40]

RAY SOWARDS,

Plaintiff,

v.

CITY OF MILPITAS, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment on the basis of qualified immunity. The Court has considered the briefing of the parties as well as the oral argument presented at the hearing on May 6, 2005. For the reasons set forth below, the Court will grant the motion.

Appendix B

I. BACKGROUND

This action arises out of the arrest of Plaintiff Ray Sowards ("Sowards"), an attorney, for sexual assault and battery of a client, Myhoa Starr ("Starr"). Starr went to the Milpitas Police Department on July 2, 2001 and reported that Sowards had sexually assaulted her. She provided a detailed written statement to Officer Lee, in which she stated that when she went to Sowards' office to deliver some papers, Sowards forcibly kissed and fondled her, ripped open her blouse, pushed her against the wall and told her he had to "fuck her" and, when she escaped, told her that he would "fuck" her next time. Defendant Sergeant Ron Gordon ("Gordon") investigated the incident for more than one month, during which time he interviewed Starr several times. Starr provided Gordon with audiotapes of two telephone conversations Starr had with Sowards, in which Sowards apologized for being so rough but told Starr that she needed to get used to it and that he wanted to have sex with her. Star subsequently reported that she had seen Sowards again on August 9, 2001 but had evaded his advances.

On August 16, 2001, Gordon and two detectives went to Sowards' office and arrested him for sexual assault, sexual battery and false imprisonment. They took him to the police station, placed him in an interrogation room and Mirandized him. In a videotaped consensual interview, Sowards denied that he had assaulted or battered Starr and identified two office mates, Wendy Okada ("Okada") and Hoa Glassey ("Glassey"), as alibi

witnesses. At some point during this interview, Glassey arrived at the police station and stated that she was Sowards' lawyer. Gordon went to greet her, told her that Sowards had identified her as a witness, and led her to another interview room where she provided a written statement. Gordon then took Glassey to Sowards' interview room and left them together after telling them that Glassey could not act as Sowards' lawyer because she was an alibi witness. Gordon videotaped the conversation between Sowards and Glassey.

On January 14, 2002, the Santa Clara County District Attorney's Office filed a misdemeanor complaint against Sowards for sexual battery. However, Starr subsequently refused to testify against Sowards, and the charges were dismissed on September 25, 2002. Sowards filed the instant action on June 20, 2003 in the Santa Clara Superior Court, asserting claims against Gordon and the City of Milpitas pursuant to 42 U.S.C. § 1983 for civil rights violations. Defendants removed the action to this Court on June 30, 2003 on the basis of federal question jurisdiction. Sowards' operative second amended complaint ("SAC") alleges claims for (1) violation of right to counsel, (2) unreasonable search and seizure and (3) violation of right to fair trial. Defendants assert that all of Sowards' claims are barred by the doctrine of qualified immunity.[1]

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1. Both the moving and responding papers devote significant argument to the issues of whether Gordon's arrest of Sowards was justified by probable cause and, alternatively, whether Gordon is entitled to qualified immunity for claims

(Cont'd)

Appendix B

II. LEGAL STANDARD

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial.

(Cont'd)

arising out of the arrest. While the SAC references Gordon's arrest of Sowards in the description of the events leading up to the alleged constitutional violations, the SAC does *not* allege that Sowards' arrest was unlawful, and none of the three claims set forth in the SAC is based upon the arrest. The Court therefore concludes that Sowards has not fairly alleged a claim arising out of his arrest and declines to address the parties' arguments on this point. The Court notes, however, that based upon the evidence in the record it appears that Gordon would be entitled to qualified immunity with respect to any such claim given Starr's explicit statements regarding Sowards' conduct, photographic evidence of Starr's injuries, and audiotapes of conversations between Sowards and Starr.

Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir.1991).

III. DISCUSSION

A. Gordon

A determination as to an officer's entitlement to qualified immunity involves a two-pronged inquiry. First, do the facts alleged, viewed in the light most favorable to the plaintiff, show that the defendant's conduct violated a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir.2002). This first prong mirrors the substantive summary judgment inquiry on the merits of the constitutional claim. *Sorrels*, 290 F.3d at 969. Second, if the plaintiff has alleged a deprivation of a constitutional right, was that right clearly established? *Saucier*, 533 U.S. at 201; *Sorrels*, 290 F.3d at 969. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. This inquiry is wholly objective; the defendant's subjective belief as to the lawfulness of his or her conduct is irrelevant. *Sorrels*, 290 F.3d at 970.

The plaintiff bears the burden of showing that the right at issue was clearly established under the second prong of the qualified immunity analysis. *Id.* at 969. Obviously, the existence of binding precedent directly on point would suffice to meet this burden. *Id.* at 970. Absent binding precedent, the plaintiff may point to decisions of other circuit courts, district courts and state courts directly on point. *Id.* However, it is not necessary that the defendant's precise conduct have been held unconstitutional previously, so long as the unlawfulness of the conduct was apparent in light of preexisting law. *Id.* In other words, "[c]losely analogous preexisting case law is not required to show that a right was clearly established." *Id.* (internal citation omitted). The plaintiff need show only that the defendant's conduct "was such a far cry from what any reasonable . . . official could have believed was legal" that the defendant knew or reasonably should have known he was breaking the law. *Id.* at 971. In more pragmatic terms, the question is whether the conduct at issue "passes the laugh test." *Id.* If so, the defendant is entitled to qualified immunity. *Id.*

1. First Claim For Violation Of Right To Counsel:

Sowards alleges that on August 16, 2001, the day he was arrested, Gordon deprived him of his "right to counsel" by stating that Glassey could not act as Sowards' attorney and by recording the conversation between Glassey and Sowards. It is unclear whether this claim is asserted under the Fifth Amendment or under

the Sixth Amendment. The Sixth Amendment guarantees a criminal defendant the right to have the assistance of counsel for his defense. *United States v. Percy*, 250 F.3d 720, 725 (9th Cir.2001). That right does not attach at the time of arrest, however; it attaches only upon the initiation of adversary judicial proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment. *United States v. Gouveia*, 467 U.S. 180, 188-90, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984); *Percy*, 250 F.3d at 725. Because such proceedings had not yet been initiated, Gordon's alleged conduct on August 16, 2001 could not have constituted a violation of Sowards' Sixth Amendment right to counsel.

The Fifth Amendment's privilege against compelled self-incrimination has been interpreted to create a right to counsel during custodial interrogations. *Cooper v. Dupnik*, 963 F.2d 1220, 1240-41 (9th Cir.1992) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). That right clearly attached at the time of Sowards' arrest. However, Sowards does not allege that he was denied the right to counsel during an interrogation.

Accordingly, the Court will grant the motion with respect to Sowards' claim that he was denied his right to counsel.

Appendix B

2. Second Claim For Violation Of Right Against Unreasonable Search And Seizure

Sowards alleges that Gordon violated the Fourth Amendment by taping his conversation with Glassey. The Fourth Amendment prohibits governmental intrusions into areas "in which there is a constitutionally protected reasonable expectation of privacy." *United States v. Van Poyck*, 77 F.3d 285, 290 (9th Cir.1996) (internal quotation marks and citations omitted). A "constitutionally protected reasonable expectation of privacy" exists if the defendant has an actual subjective expectation of privacy and society is prepared to recognize that expectation. *Id.* The government's recording of a defendant's conversation constitutes a violation of the Fourth Amendment if the defendant reasonably expected that conversation to be private. *Katz v. United States*, 389 U.S. 347, 354, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

In the instant case, Sowards has alleged facts demonstrating a violation of the Fourth Amendment. "It is axiomatic that the attorney-client privilege confers upon the client an expectation of privacy in his or her confidential communications with the attorney." *DeMassa v. Nunez*, 770 F.2d 1505, 1506 (9th Cir.1985). Glassey identified herself as Sowards' attorney and asked to consult with him in that role. Sowards thus had a legitimate expectation of privacy with respect to his conversation with Glassey.

Defendants argue that because Gordon informed Sowards and Glassey that, in his opinion, Glassey could

not act as Sowards' lawyer, Sowards did not have a legitimate expectation of privacy in the ensuing conversation. Defendants have not cited, and the Court has not discovered, any case suggesting that an arrestee must accept the subjective opinion of a police officer as to whether the arrestee's chosen attorney properly can represent him, and thus forego the legitimate expectation of privacy that otherwise would attach to an attorney-client communication. There is no indication in the record that Gordon informed Sowards that he was going to tape record the conversation based upon his opinion that Glassey could not act as Sowards' attorney. Under these circumstances, the Court concludes as a matter of law that Sowards had a legitimate expectation of privacy in his conversation with Glassey.

The Court notes that the state trial court granted Sowards' motion to suppress the recording of the conversation on the ground that the recording violated the attorney-client privilege. Sowards argues that this ruling is *res judicata* to relitigation of whether the recording violated his federal constitutional rights. Defendants correctly assert that an evidentiary ruling that particular evidence is inadmissible because of a violation of a state law privilege is not dispositive of the federal constitutional question. It has long been the rule in the Ninth Circuit that "[s]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir.1985). The Ninth Circuit recently suggested that there may be some question as to "whether the attorney-client privilege has

a constitutional dimension in the criminal context." *Bittaker v. Woodford*, 331 F.3d 715, 723 n. 7 (9th Cir.2003). Unless and until this question is answered in the affirmative, a state court's adjudication that the privilege applies to a particular conversation cannot be dispositive of a federal constitutional claim based upon the government's recording of that conversation. However, as discussed above, the Court concludes that viewing the facts alleged in the light most favorable to Sowards, and entirely apart from the legal determination by the state court, Sowards has established a violation of his Fourth Amendment rights.

The Court nonetheless concludes that Gordon is entitled to summary judgment on the basis of qualified immunity, because in the particular context of this case the right violated was not clearly established. Sowards has not identified-and much to its surprise, the Court has been unable to locate-any authority clearly establishing that the government's recording of a conversation between an arrestee and his attorney constitutes an unreasonable *search and seizure.*[2] Moreover, at least one district court has found qualified immunity on similar facts. In *Riddick v. Baker*, 1997 WL 221133 (E.D.Pa.1997), prison officials allegedly

2. Obviously, it is clearly established that an intrusion into the attorney-client relationship violates a defendant's *Sixth Amendment* right to counsel if resulting prejudice can be demonstrated. *See, e.g., United States v. Hernandez*, 937 F.2d 1490, 1493 (9th Cir.1991). As discussed above, the Sixth Amendment right to counsel had not attached at the time of the incident in question.

eavesdropped on the conversation of a prisoner and his visiting attorney through the use of an intercom system. The court held that "qualified immunity shields the defendants from section 1983 liability because a prisoner does not have a 'clearly established' Fourth Amendment right to have his conversations with his attorney be free of governmental eavesdropping." *Id.* at *2. While *Riddick* addresses the rights of prisoners rather than arrestees, it is one of the very few decisions addressing the Fourth Amendment's application to the recording of attorney-client conversations and reasonably could be read to mean that there is no clearly established free-standing *Fourth Amendment* bar to recording such conversations.

The absence of a clearly established right is even more pronounced when Gordon's conviction that Glassey could not be acting as Sowards' attorney is taken into account. Sowards has not provided and the Court was unable to find any authority addressing a situation in which an officer recorded a conversation between a suspect and an individual he considered to be a *witness* rather than the suspect's attorney. Accordingly, even viewing the facts in the light most favorable to Sowards, the Court concludes that given the dearth of contrary authority, a reasonable officer in Gordon's position could have believed that his recording of the conversation between Sowards and Glassey in this rather unique factual context was lawful. The Court therefore will grant Gordon's motion for summary judgment as to Sowards' claim that the recording constituted an unreasonable search and seizure.

3. Third Claim For Violation Of Right To Fair Trial

Sowards alleges that he was deprived of his Sixth Amendment right to a fair trial by Gordon's conduct in taping Sowards' conversation with Glassey and giving that tape to the prosecutor. It is difficult to discern how Sowards was denied a *fair* trial when the evidence of the conversation was suppressed, the charges were dropped, and the case never went to trial at all. Accordingly, the Court concludes that Gordon's alleged conduct does not constitute a violation of the Sixth Amendment right to fair trial.

B. CITY OF MILPITAS

Sowards alleges that Gordon's alleged violations of his constitutional rights were pursuant to the policies and practices of the City of Milpitas and Milpitas Police Department. With respect to the one constitutional violation that may have occurred, violation of the Fourth Amendment arising from the recording of the conversation between Sowards and Glassey, there is no evidence that Gordon acted pursuant to any such policies or practices. Accordingly, the Court will grant the City's motion for summary judgment.

Appendix B

IV. ORDER

Defendants' motion for summary judgment is GRANTED.

DATED: 7/5/05

/s/ electronic signature authorized

JEREMY FOGEL
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 5, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-16530

D.C. No. CV-03-03036-JF
Northern District of California,
San Jose

RAY SOWARDS,

Plaintiff - Appellant,

v.

CITY OF MILPITAS; et al.,

Defendants - Appellees.

ORDER

Before: O'SCANNLAIN, HAWKINS, and WARDLAW, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing and petition for rehearing en banc.

Appendix C

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and petition for rehearing en banc are hereby DENIED.